Beginning with Cox's request to BellSouth in 1991, ISPs began asking BOCs to make N11 numbers and associated services available for information services. To date, all but BellSouth have refused to make those numbers available, despite an FCC determination that there is "no legal or regulatory impediment" to providing service through N11 numbers.[19] See N11 Codes and Other Abbreviated Dialing Arrangements, Notice of Proposed Rulemaking, 7 FCC Rcd 3004, n. 1 (1992).[20] Typically, the BOCs have claimed that N11 numbers are reserved for "non-commercial" or "public interest" uses, even though official numbering authorities have not reserved N11 numbers for these purposes. At the same time, BOCs continue to use N11 numbers for their own commercial advantage in competitive markets and have expanded those uses even while they deny access to ISPs.

N11 numbers are used for commercial purposes in a variety of ways. The most common is directory assistance call completion, which is offered in many BOC territories through the N11 number 411. Directory assistance call completion gives the BOC a significant advantage in the intraLATA toll market, because callers who use directory

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19/ BellSouth only made an N11 available to Cox for information services once the Georgia PSC ordered a trial of N11 for information services.

20/ While the Commission initiated its rulemaking on N11 numbering policies nearly three years ago, it has not yet adopted an order confirming its tentative view, expressed in its Notice and in an advisory letter of its General Counsel, that there is no regulatory impediment to making these numbers available to ISPs. While most BOCs have used this as a pretext to delay providing these numbers to competitors, it is plain that FCC regulation to date has failed to address the significant competitive concerns related to BOC usse and assignment of N11 numbers.

assistance call completion are not given a choice of carriers, regardless of current state policies regarding intraLATA toll competition.[21/]

BOCs also use N11 numbers to sell competitive services. In some areas of the country, 811 is used to reach the telephone business office, which sells both monopoly local services and competitive services such as voice messaging. The advantage of using the N11 number to sell these competitive services is significant. In a similar vein, many BOCs use 611 for access to repair service both for faults in the telephone network and for problems with customer-owned inside wiring. Again, the telephone company's competitive inside wire repair service benefits greatly both from being offered through the same number as regular telephone service repair and from the convenient, abbreviated nature of the access through 611.

These existing competitive uses of N11 numbers demonstrate that BOC claims that N11 numbers are reserved for "non-commercial" uses are simply a diversion from the discriminatory nature of their refusal to provide N11 numbers to non-BOC information services providers. Moreover, BOC uses of N11 numbers, both generally and for commercial purposes, have increased noticably since ISPs first asked for those numbers to provide information services. For instance, within the last year Bell Atlantic began using 611 for access to all of its repair services in the Washington, D.C. metropolitan area, despite the pendency of the FCC rulemaking on N11 numbers and the pendency of proceedings

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21/ It appears likely that the same results would follow if BOCs were permitted to provide interLATA service. Thus, interLATA competitors would be directly harmed by the BOCs' continuing, often state-mandated, monopoly on local exchange service and directory assistance.

regarding the appropriate uses of N11 numbers in two of the three jurisdictions where the new 611 service was introduced.[22]

Thus, BOCs consistently and persistently discriminate against independent ISPs. In fact, as the Georgia experience demonstrates, they continue to discriminate, often by shifting to new methods, after they are caught. The potential and incentive for discrimination will be, if anything, much greater if the BOCs are permitted into the interexchange and manufacturing markets where the potential benefits of discrimination are much greater.

B. BOCs Have Abused Their Monopoly Position by Taking Advantage of Their Local Exchange Monopolies in Competitive Markets.

BOC abuses are not limited to discrimination. They also take advantage of their monopoly status in the local exchange to create advantages for themselves in competitive markets. Two particularly prominent examples of such behavior were discovered by the Georgia Public Service Commission in its MemoryCall proceeding.

First, certain BellSouth policies simply made it harder for end users to purchase competitive voice messaging products than to purchase MemoryCall. Voice messaging requires an end user to purchase some form of call forwarding, usually call forwarding variable, at the same time the user buys the voice messaging service. (The call forwarding service is necessary so that calls will be sent to the voice messaging provider.)

22/ See Petition of the Washington Post Company Requesting the Assignment of an N11 Code, Case No. 8582 (Md. PSC); Ex Parte: Investigating N11 Access to Information Service Providers, Case No. PUC930019 (Va. SCC).

While BellSouth would permit independent voice messaging providers to order call forwarding for their customers, it was impractical for them to do so because BellSouth also held them liable for any charges that were not paid by the end users. BellSouth's MemoryCall service, which was offered through BellSouth's regular customer service representatives, was never held liable for end user telephone service charges because the end users had ordered their call forwarding services directly. Georgia MemoryCall Order at 31-41. As a result, end users calling BellSouth could purchase both services with one phone call, but end users who wanted to purchase a non-BellSouth voice messaging service could do so only by calling the voice messaging provider first and then separately ordering call forwarding from BellSouth. The ability to offer "one stop shopping" was a significant marketplace advantage for BellSouth. Id. at 36-37.

BellSouth further leveraged this advantage through a process known as "unhooking." When an end user called to order call forwarding, BellSouth customer service representatives asked whether the end user was purchasing voice messaging service and, if so, suggested that the end user should purchase BellSouth's MemoryCall service instead. The Georgia Public Service Commission found unsurprisingly that this practice, greatly disadvantaged independent voice messaging providers. They not only were unable to provide all of the services needed by their customers, due to BellSouth's billing practices for call forwarding services, but the voice messaging providers were forced to send those customers to a company that actively tried to convince them to switch to a different voice messaging service. Id. at 38-41. The FCC, in its Computer III Remand Order, specifically found that this practice was unlawful.[23/]

C. BOCs Cross-Subsidize Their Existing Businesses.

Another important competitive danger is cross-subsidization. Cross-subsidization is a risk any time that a regulated monopoly enters into unregulated or lightly regulated competitive businesses. There are significant incentives to shift revenues from the regulated business to the competitive business and to shift costs from the competitive business to the regulated business. The evidence of the past ten years demonstrates that the BOCs can and do succumb to this temptation.

Recent proceedings in Georgia highlight the risk of cross-subsidization. Following extensive hearings, the Georgia Public Service Commission found that BellSouth had both the incentive and the ability to engage in cross-subsidization of its competitive businesses to the detriment of captive telephone ratepayers.[24/]

As a result of its findings, the Georgia Public Service Commission decided to require an audit of BellSouth's operations in Georgia to determine if there were actual cross-subsidies. The audit, completed in September, 1994, found that there are significant cross-subsidies running from BellSouth's regulated (i.e., monopoly) services to unregulated (i.e.,

23/ See Computer III Remand Proceeding, 6 FCC Rcd 7571, 7623 n.211 (1991). Ironically, the FCC did not impose a forfeiture or any other sanction on BellSouth, despite this explicit finding.

24/ See Investigation into Cross Subsidy Matters Relating to Southern Bell Telephone and Telegraph Company, Docket No. 3987-U, August 25, 1992.

competitive) services.[25] These subsidies included improper allocation of income tax benefits, assignment of costs of unregulated services to regulated accounts and shifting costs of unregulated customer premises equipment to regulated accounts. The audit also found there was good cause for more careful scrutiny of intracompany transactions and recommended referral of information regarding transactions with foreign affiliates to federal and state tax authorities.

The cross-subsidies are particularly significant for two reasons. First, they show how a BOC can leverage its current monopoly in local exchange services to benefit its operations in competitive markets. Second, cross-subsidies hurt consumers both as ratepayers and as purchasers of competitive services. The damage to the markets for competitive services is particularly pernicious, because it reduces consumer choice and, in the long run, is harmful to the economy as a whole.

Moreover, cross-subsidization is not an isolated event. Several audits have found significant cross-subsidies between regulated and unregulated BOC businesses. For example, the National Association of Regulatory Utility Commissioners ("NARUC") recently released the results of an audit of Pacific Bell.[26] This audit uncovered substantial cross-subsidization despite the presence of numerous accounting "safeguards":

> Regulatory agencies' heavy reliance on non-structure safeguards, such as cost allocation systems and project tracking systems may be misplaced. These systems and procedures appear to be inadequate to ensure that cross-subsidizations will not occur.

25/ A copy of the executive summary of the audit report is attached hereto as Exhibit 3.

26/ See supra note 12.

> The concern is that these safeguards may be creating the perverse effect of encouraging cross-subsidizations.[27]

The NARUC Audit focused on three areas: research and development, enhanced services and yellow pages. In each area, the auditors found that new products whose revenues would flow to Pacific Telesis shareholders were developed at ratepayer expense. For example, in the research and development area, the auditors made the following findings:

- Pacific Bell's subject experts working on both competitive and non-competitive projects have not been correctly segregating their time between the two business sectors.
- Pacific Bell made certain infrastructure modifications at the expense of the general body of ratepayers. Those modifications were mainly to accommodate the development of its competitive enhanced services. However under Pacific Telesis' corporate policy, only its shareholders will realize the potential profits from these projects.
- R&D expenditures are co-mingled with other operating expenses. Pacific Bell is unable to delineate expenditures on a per project basis. . . . Because tracking procedures for R&D projects are arbitrarily applied, opportunities for cost shifting occur.
- The Pacific Telesis Group's decision to retain the potentially lucrative PCS retail line of business for its shareholders is contrary to the regulatory concept that the rewards of a new product should be assigned to the part of the business that took on the risks of developing the product. Research and development costs for PCS were borne by the general body of telephone ratepayers.[28]

The results of the NARUC Audit of Pacific Bell and the Georgia PSC audit of BellSouth demonstrate that cross-subsidy is not an isolated occurrence, but rather a normal

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27/ NARUC Audit at ii.

28/ NARUC Audit at B-10 - B-12.

business practice. The BOCs consistently and systematically abuse their local exchange monopoly to the determinant of competitors and the public and this serious problem only would worsen if the Decree were vacated and BOCs were permitted to enter the interexchange and equipment manufacturing markets.

D. Existing Regulations Will Do Nothing to Prevent BOC Abuses of Their Monopoly Power.

The BOC response to descriptions of their abuses is to claim that the abuses are in the past and that existing regulations are sufficient to prevent any further abuses of monopoly power. Motion at 18. Nothing could be further from the truth. In reality, the abuses described above have taken place under current regulation and the BOCs are making every effort to tear down existing safeguards, leaving nothing to protect against monopoly abuse.

First, it is important to recognize that the abuses described above have taken place under the current regulatory regime. The MemoryCall case in Georgia, the Georgia ONA proceeding, the BOC refusal to provide N11 service and the cross-subsidy determinations all took place under the same regulatory regimes that are in place today.[29] It is no surprise, consequently, that the Ninth Circuit recently held that the FCC has failed to show that its nonstructural safeguards regime is sufficient to protect against monopoly abuses

29/ MemoryCall and the Georgia ONA proceeding took place under the FCC's original Computer III rules, but there is no material difference between those rules and the Computer III Remand Order rules.

by BOCs in the information services marketplace.[30] There is every reason to think that current rules, having failed to prevent these activities before, would continue to do so in the future.

What is most striking about these cases is that, even when BOCs are caught engaging in anti-competitive activities, they are not penalized. The FCC, after acknowledging the finding of the Georgia PSC that BellSouth had engaged in improper conduct in the MemoryCall case, imposed no sanctions.[31] In fact, the FCC preempted the Georgia Public Service Commission's decision imposing sanctions on BellSouth for its MemoryCall abuses.[32]

While current regulations are not sufficient to protect against abuse, the BOCs constantly work to reduce the effectiveness of those regulations even further. For instance, BellSouth recently proposed a regime in Georgia that would have eliminated all regulation of most of its services, including many services that are vital to information services providers. The BellSouth proposal would, among other things, have permitted price discrimination for such "competitive" services as call forwarding and touch tone.[33] The BOCs also have been the chief proponent of FCC preemption of state regulation of information services, in large

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30/ California v. F.C.C., slip op at 12768. The Ninth Circuit specifically cited the MemoryCall case as an example of the failure of existing regulation. Id. at 12766.

31/ See Computer III Remand Order, 6 FCC Rcd at 7623 n. 211.

32/ See Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992)

33/ A copy of this proposal, dubbed "Georgians FIRST" by BellSouth, is attached as Exhibit 4.

part because state regulation has been considerably more stringent than federal regulation.[34] BOCs have fought against all efforts to permit the growth of competition to their businesses, even while working to eliminate protection against their abuses of monopoly power.[35] In essence, the BOC strategy is to eliminate all barriers to their unfettered use of monopoly power while restraining the development of competition in the local exchange business.

Moreover, BOCs already are working to bring their monopoly power to bear in markets closely related to interexchange and equipment manufacturing. As described above, monopoly directory assistance service is being used to protect BOC intraLATA toll revenues. Similarly, BellSouth offers services ancillary to its Centrex service at rates that are better than those available to PBX users and, as found in the Georgia cross-subsidy audit, also shifts costs related to unregulated customer premises equipment to regulated accounts. The BOCs are taking these steps today, when their stakes in the toll and equipment markets are relatively small. It is almost certain that they will do much more to leverage their local exchange monopolies if they are permitted to enter the interLATA and equipment manufacturing marketplaces.

The assertion that existing regulation is adequate to prevent anti-competitive behavior by the BOC is further contradicted by recent congressional efforts to pass telecommunications reform legislation. Although one purpose of the proposed legislation

34/ In the MemoryCall case, BellSouth initiated the FCC proceeding that preempted Georgia's responses to BellSouth's competitive abuses.

35/ See Edmund Andrews, Bell Compaies Use Regulation to Stop Rivals, New York Times, Page A1, July 24, 1994.

was to eliminate certain Decree restrictions, those restrictions were to be replaced by specific additional grants of authority to the FCC and the Department of Justice.[36] Specifically, the FCC and the DOJ were required to stage BOC entry into new markets based on their assessment of market conditions.[37] Furthermore, BOC entry into competitive markets, such as electronic publishing and video programming, would have been subject to substantial safeguards, including a separate subsidiary requirement that the FCC has abandoned for BOC enhanced services. Thus, it was the opinion of at least the House of Representatives and the Administration that existing law and regulation is an inadequate replacement for the Decree.

The FCC is a strong advocate of reform of the Communications Act. Indeed, in explaining why a number of recent initiatives have not been able to withstand judicial scrutiny, the Commission has argued that such judicial losses demonstrate the need for comprehensive legislative reform. While the Commission has advocated BOC entry into certain competitive markets, including cable television and PCS, at no time has the Commission ever stated that existing federal law is an adequate substitute for the Decree.[38]

36/ Legislation would have left portions of the Decree in place, notably the equal access requirement.

37/ For example, the Antitrust Reform Act of 1993 (formerly the Antitrust and Communications Reform Act of 1993) (H.R. 3626), which passed the House by an overwhelming majority, required the FCC and the DOJ to apply standards to BOC entry into new markets that would have been substantially similar to the standards applied by this Court in reviewing MFJ waiver requests.

38/ "[A]ny plan for removing [MFJ] restrictions must provide adequate safeguards to preclude the ROBCs from using their existing market power in the local exchange to undermine competition in markets they seek to enter." Statement of Reed E. Hundt, before the Committee on Commerce, Science and Transportation, United States Sènate (Feb. 23, 1991). Even the BOCs acknowledge that the FCC would have to develop rules for cost

(continued...)

The existence of an appropriate regulatory regime is only half the battle in preventing anti-competitive behavior by a monopolist. Absent consistent and effective enforcement efforts, the potential for BOC abuse is enormous. State and federal regulators often do not have sufficient resources to effectively monitor the BOCs. The fact that a mere scattering of enforcement proceedings uncover substantial anti-competitive behavior involving billions of dollars in costs to consumers raises important questions about the magnitude of anti-competitive behavior that never is exposed.

In this context, any assumptions about the ability of regulators to stem anti-competitive BOC actions are uncertain at best. Given the ineffectiveness of current regulation and enforcement in markets in which the BOCs participate today, there is no basis to assume, let alone conclude, that regulators can protect against monopoly abuse. When the additional incentives for abuse that would be created by entry into interexchange and equipment manufacturing markets are considered, it is plain that existing safeguards will be insufficient to protect against abuse and that such abuse is almost certain.

38/ (...continued)
accounting, customer proprietary network information use and other matters in the event the Decree were vacated. See Ameritech's Petition for Declaratory Ruling and Related waivers to Establish a New Regulatory Model for the Ameritech Region, FCC DA 93-481, filed March 1, 1993.

IV. ENTRY OF THE BELL OPERATING COMPANIES INTO NEW COMPETITIVE MARKETS CREATES SUBSTANTIAL POSSIBILITIES FOR ANTI-COMPETITIVE BEHAVIOR.

The primary goal of the Motion to Vacate is to enable the BOCs to enter the interexchange and manufacturing markets. Based on the experience of the BOCs in the information services market, BOC entry into other competitive markets is likely to characterized by the same types of efforts to disadvantage competitors and captive ratepayers. Indeed, this type of anticompetitive behavior already has surfaced in the developing markets for video dialtone and PCS.

A. Provision of Video Dialtone By the BOCs Presents A Strong Likelihood of Anti-competitive Behavior.

In 1992, the Commission adopted rules permitting telephone companies to provide video dialtone, a common carrier video transport service.[39] In order to enter into the video dialtone market, the BOCs have proposed retiring the existing local loop plant and making significant investments in network upgrades. The BOCs universally have proposed that telephone ratepayers bear a substantial portion of the costs they have identified for these upgrades. Pacific Bell, for example, has proposed building an entirely new network that would cost $16 billion.[40] Pacific Bell has argued that only those costs that are

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39/ Telephone Company - Cable Television Cross-Ownership, Second Report and Order Recommendation to Congress and Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) ("Video Dialtone Order"), appeal pending sub. nom. Mankato Citizens Telephone Co. v. FCC, No. 92-1404 (D.C. Cir. Sept. 1992).

40/ Applications of Pacific Bell, File Nos. W-P-C 6913-6916 (filed Dec. 20, 1993).

"incremental" to video dialtone must be imposed on video dialtone customers, even though the only reason a network upgrade is necessary is so that Pacific Bell can enter into the video market.[41]

The conclusion that telephone ratepayers will be unfairly financing video dialtone is supported by the NARUC audit of Pacific Bell. The NARUC auditors found that Pacific Bell had never quantified the benefits to ratepayers that would result from its proposed $16 billion investment in a broadband network. However, the auditors observed that these upgrades were not required for telephone services and that the main driver for this investment was the ability to offer unregulated competitive services.[42]

The Commission's regulatory regime for video dialtone is totally inadequate to prevent this cross-subsidization. Unlike the information services discussed in Section III, the Commission has not adopted accounting rules specifically intended to address potential subsidization of video dialtone. Instead, the Commission intends to apply the same rules that it applies to information services. Video Dialtone Order, 7 FCC Rcd at 5828.

These rules are not effective for video dialtone because there is no mechanism for separating regulated video dialtone costs from regulated telephone costs. Part 64 of the Commission's Rules requires BOCs to file Cost Allocation Manuals to demonstrate how costs will be allocated between regulated and unregulated services, but there is no comparable

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41/ The potential impact of these video dialtone proposals on ratepayers explains why state regulators and consumer groups have almost universally opposed BOC video dialtone applications. See, e.g., Comments of the California Public Utilities Commission (filed Feb. 14, 1994).

42/ NARUC Audit at B-50 - B-51.

requirement for identifying and allocating regulated video dialtone costs. Instead, the Commission has given the BOCs discretion to propose any allocation scheme they prefer. While the Commission claims that it will scrutinize BOC cost allocations in reviewing video dialtone tariffs, the Commission's recent Video Dialtone Reconsideration Order demonstrates that the primary goal of the tariff process is to produce low video dialtone rates, not to protect ratepayers and competitors.[43/]

Video dialtone also presents substantial opportunities for the BOCs to discriminate against unaffiliated programmers. Although video dialtone must be offered by LECs on a common carrier basis, the one application the Commission has approved proposed a relationship clearly intended to benefit a single favored programmer in which the BOC had an ownership interest. New Jersey Bell Telephone Co., 9 FCC Rcd 3677 (1994), appeal pending sub nom. Adelphia Communications Corp. v. FCC, Case No. 94-1616 (D.C. Cir. September 7, 1994). In that case, Bell Atlantic flaunted the Commission's common carriage requirement by proposing to allocate 94 percent of capacity to Future Vision of America, a programmer in which it holds an option to acquire an ownership interest. Although Bell

43/ "We emphasize that we are not seeking to saddle video dialtone with an unreasonable proportion of overheads and common costs . . . imposing excessive cost burdens on video dialtone could diminish demand." Telephone Company-Cable Television Cross-Ownership, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 94-269 at ¶ 220 (adopted October 20, 1994, released November 7, 1994), appeal pending sub. nom., National Cable Television Association v. FCC, (D.C. Cir. filed November 9, 1994 Docket No. 94-1696).

Atlantic amended that original proposal, the Commission still approved an arrangement that places no limits on the capacity that ultimately may be used by Future Vision.[44]

Although the Commission has imposed nondiscrimination requirements on access to the regulated Level 1 video dialtone platform, BOCs can provide unregulated Level 2 services, such as gateways and other enhanced services, on a discriminatory basis. Thus, because the BOCs are permitted to own up to 5 percent of a programmer on their video dialtone networks, there is a strong incentive to discriminate in the provision of Level 2 services in a manner that favors the affiliated programmer.[45]

There also is a strong incentive for BOCs to develop their video dialtone networks in a manner that favors affiliated programmers. For example, programmers using Bell Atlantic's Dover, New Jersey video dialtone network must utilize software to connect the programmer to the network. The software offered by Bell Atlantic for this purpose was licensed to Bell Atlantic by FutureVision of America, a video dialtone programmer in which Bell Atlantic holds an ownership interest. See New Jersey Bell Telephone Co., 9 FCC Rcd at 3689 (1994). This unregulated licensing agreement assures that FutureVision will be able

44/ In approving the Bell Atlantic/Future Vision relationship, the Commission essentially has permitted Bell Atlantic to operate as a cable operator without subjecting it to the panoply of regulations imposed on cable operators, including the requirement to obtain a local franchise.

45/ BOCs also may carry on their video dialtone networks programming owned by the BOC but provided by an "independent" packager. Given the ability of the BOC to provide Level 2 services on a discriminatory basis and own up to a 5 percent interest, there are substantial questions as to the independence of an unaffiliated program packager.

to interconnect with the network more efficiently than other programmers because Bell Atlantic will build the network specifically to be used with the FutureVision software.

Moreover, BOC access to customer proprietary network information (CPNI) can be used to disadvantage BOC competitors or unaffiliated programmers. For example, under the Commission's existing CPNI rules, a BOC may obtain a list of calls made to the customer service number of a competing cable operator or to the number used by the cable operator for pay-per-view orders. The BOC has no obligation to notify the operator that it may request that its CPNI not be released to BOC personnel.[46] Similarly, the BOC could monitor calls made to unaffiliated programmers or customer selection of particular programmers. The potential for abuse of this information by the BOCs is plain.

B. The BOCs Will Attempt to Leverage Their Local Exchange Monopoly in the PCS Market.

In recognition of Cox's efforts in developing and demonstrating the technical feasibility of cable-based Personal Communications Services, the FCC in December 1993, finalized the award of a pioneer preference to Cox and two other PCS pioneers.[47] The

46/ Moreover, while the BOC may use CPNI for its telephone customers (without their consent) to market competitive services, its potential competitors only may obtain access to CPNI with the consent of the customer. Thus, there is a significant imbalance in access to CPNI that materially disadvantages BOC competitors.

47/ "Cox was the first to propose using cable for backbone purposes and begin testing actual equipment... Cox has demonstrated that it has developed the capabilities or possibilities of the technology or service and has brought them to a more advanced or effective state as required by our rules..." Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Report and Order, 9 FCC Rcd 1337, 1344-45 (1994).

Commission subsequently invited Cox to file its preference license application for the Los Angeles-San Diego Major Trading Area ("MTA"), the area Cox had consistently requested as its preference award.[48]

Starting from the moment the FCC announced its decision to award a preference to Cox for the MTA that includes southern California, PacBell launched an extensive and aggressive disinformation campaign designed to have Cox's PCS development efforts and its preference discredited. PacBell's motive is clear: if Cox's preference was overturned, PacBell would not face the possibility of early and direct competition from a wireless service provider.[49]

Among the more notable incidents in PacBell's anti-Cox crusade are its repeated appeals for emergency expedited review to the U.S. Court for the District of Columbia Circuit of the FCC's award of an MTA preference to Cox and the two other preference holders; a steady barrage of "emergency motions" filed with the Court for review of procedural rulings; the filing and prosecution of a complaint twice rejected by the FCC of improper lobbying influence by the preference holders to induce the FCC to award them

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48/ See Commission Invites Filing Of Broadband Personal Communications Services Pioneer's Preference Application, released February 25, 1994; and Announcement of Acceptance of Broadband PCS Applications, Report No. CW-94-1, released August 25, 1994.

49/ PacBell supported the PCS preference program until the FCC tentatively denied PacBell a preference, Request for a Pioneer's Preference filed in GN Docket No. 90-314 on May 4, 1992, for its PCS development work, which apparently consisted of funding Bellcore's research and development of PCS systems that would remain dependent upon BOC infrastructure for interconnection and all network services and functions. See Third Report and Order, 9 FCC Rcd 1337, 1366 (1994).

preferences; a persistent campaign in Congress to convince legislators that Cox and other preference holders should either be stripped of their licenses or made to pay a premium above the market auction rate for the preference licenses under an auction-based formula; and PacBell's subsequent public attack on GATT legislation for imposing a more reasonable auction based payment formula on the PCS preference licenses.

PacBell has made no secret of its intention to be the successful bidder on the remaining 30 MHz MTA license to be auctioned for southern California. Perhaps because PacBell and the other BOC's were handed wireline cellular licenses for free in a wireline set-aside when cellular was initially licensed, PacBell is piqued at the notion of having to compete in the auction marketplace for a PCS license. Its aggressive actions that demonstrate reckless disregard for accuracy or balance show that it is unwilling to accept competition and that it will take any action it can to preserve its monopoly.

BOC entry into the PCS market also raises substantial concerns about BOC anticompetitive conduct with regard to interconnection arrangements. Under existing federal regulations, LECs are required to provide reasonable, non-discriminatory and fair interconnection in the same manner as the LECs provide interconnection to cellular operators, i.e., pursuant to negotiated agreements, rather than tariffs. The Commission's reliance on the cellular model is extremely troublesome from the perspective of a future PCS operator, because the early implementation of cellular service was marked by difficult negotiations and sometimes the complete refusal by a BOC to provide interconnection even when the BOC already provided the same form of interconnection to itself. Even now, it often is necessary for Commission staff to intervene before a reasonable interconnection agreement can be negotiated.[50]

The potential for the BOCs to use interconnection rates as a competitive weapon is substantial. In the absence of any form of tariff or reporting requirement, there is no way to determine whether the agreement negotiated by a particular operator is unreasonably discriminatory. More fundamentally, a nondiscrimination requirement is insufficient to promote competition because the BOC will "negotiate" a high interconnection rate with its cellular and PCS affiliates, and then impose that "nondiscriminatory" rate on unaffiliated competitors.

Consequently, unless the Commission regulates the reasonableness of interconnection rates there is no hope that PCS will ever be able to compete with BOC local exchange offerings. The Commission's current rules and proposals, which rely on a negotiated mutual compensation agreement that was never implemented in the cellular market, are ill-suited to this task because of the substantial difference in bargaining power between non-BOC PCS providers and the BOC. For the foreseeable future there will be a substantial imbalance of traffic between the BOC and the PCS provider because there will be far fewer PCS customers. This imbalance creates the incentive for the BOC to negotiate an artificially high mutual compensation rate, because the BOC will more often than not be receiving this amount for terminating traffic from the PCS provider, rather than paying it.

50/ CMRS Equal Access and Interconnection Obligators Pertaining to Competitive Mobile Radio Services, CC Docket No. 94-54, Notice of Proposed Rulemaking at ¶ 112 (July, 1994).

The BOC has no incentive to be flexible in negotiating the compensation rate because it has far less to lose than the PCS provider in the event no agreement is reached.

It is revealing that the BOCs by and large opposed the FCC's mutual compensation requirement or offered interpretations of its scope and applicability that would gut its effectiveness. PacBell, for example, suggested that the FCC cannot set intrastate mutual compensation requirements and that PacBell will not pay interstate compensation. Even more troubling, PacBell has stated its intention of setting its own compensation rate for interconnection based on its view of the relevant costs, recreating in the PCS interconnection arena the same uneconomic cost quagmire that has stymied the FCC's expanded interconnection CAP initiatives.[51]

In addressing BOC participation in PCS, the Commission determined that adherence to existing cost allocation rules would be sufficient to prevent anti-competitive behavior. PacBell's statements plainly demonstrate its intention to load costs onto PCS providers who require interconnection. Neither FCC nor state regulators have the regulatory tools to ensure these same costs are imposed on PacBell's own PCS interconnection. More fundamentally, even if PacBell does not discriminate between its PCS business and its competitors in interconnection, it will set its prices stategically to limit its competitor's ability

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51/ See Reply Comments of Pacific Bell, Nevada Bell and Pacific Bell Mobile Services, CC Docket No. 94-54, October 13, 1994 at 7-10. As demonstrated by the Commission's problems in the expanded interconnection proceeding, even the imposition of a tariff filing requirement for PCS interconnection would be insufficient to control unreasonable pricing by the BOCs.

to challenge its local loop monopoly. Regulators have not demonstrated their ability to halt BOC anti-competitive pricing.

Commission and state current rules and policies are plainly insufficient to prevent anti-competitive behavior by the BOCs in the PCS market. Until regulators demonstrate that they can effectively regulate rates for interconnection with BOC networks or until effective local exchange competition develops, there is no basis for vacating the Decree.

VI. CONCLUSION

The Motion to Vacate is premised on assertions about competition in, and regulation of, the telecommunications market that are not supported by the facts. Legal, economic and technical barriers to entry continue to perpetuate the BOC local exchange monopoly. The BOCs assert that state and federal regulation can prevent the BOCs from leveraging their local exchange monopoly in competitive markets, but Cox has demonstrated that cross-subsidization and discrimination remain pervasive problems notwithstanding the best intentions of regulators. The BOCs have demonstrated a pattern of substantial and continuing anti-competitive conduct and only by preserving the Decree can this Court protect the public interest.

Respectfully submitted,

COX ENTERPRISES, INC.

Werner K. Hartenberger
Laura H. Phillips
J.G. Harrington
Steven F. Morris

Its Attorneys

Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

202-857-2500

November 16, 1994

CERTIFICATE OF SERVICE

I, Laura H. Phillips, hereby certify that on this 16th day of November, 1994, true and correct copies of Comments for Cox Enteprises, Inc. on the Motion of Bell Atlantic, BellSouth, NYNEX and Southwestern Bell to Vacate the Decree were mailed, first-class-postage paid, to all parites shown on the attached service list.

Laura Phillips

Laura H. Phillips

SERVICE LIST

NAME	ADDRESS
United States Department of Justice	Donald J. Russell, Esq. Antitrust Division U.S. Department of Justice Chief, Telecommunications Task Force 555 4th Street, N.W., Rm. 8104 Washington, D.C. 20001
	Nancy C. Garrison, Esq. Senior Appellate and Communications Counsel Antitrust Division U.S. Department of Justice 10th & Constitution Ave., N.W. Room 3224 Washington, D.C. 20530
	Jonathan M. Rich, Esq. U.S. Department of Justice 555 4th Street, N.W. Room 8104 Washington, D.C. 20001
AT&T	Robert D. McLean, Jr. Sidley & Austin 1722 Eye Street, N.W. Washington, D.C. 20006
Ameritech	Larry Robbins, Esq. Meyer, Brown & Platt 2000 Pennsylvania Ave., N.W. Suite 6500 Washington, D.C. 20006
Pacific Telesis Group	Richard W. Odgers, Esq. James L. Wurtz, Esq. Pacific Telesis Group Suite 400 1275 Pennsylvania Ave., N.W. Washington, D.C. 20004
U S West, Inc.	Charles P. Russ, Esq. Executive Vice President, General Counsel and Secretary U S West, Inc. Suite 700 1020 19th Street, N.W. Washington, D.C. 20036